

# UNITED STATES DISTRICT COURT

# **DISTRICT OF NEVADA**

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THOMAS BURDSAL.

Plaintiff,

V.

SCOTT DAVIS, et. al.,

## Defendants

Case No. 3:23-cv-00074-CLB

**ORDER GRANTING MOTION  
TO SUBSTITUTE DOE DEFENDANTS  
AND DENYING MOTION FOR  
COUNSEL**

[ECF Nos. 29, 30]

10 Before the Court is Plaintiff Thomas Burdsal’s (“Burdsal”) motion to substitute Doe  
11 Defendants, (ECF No. 29), and motion for appointment of counsel, (ECF No. 30).  
12 Defendants Charles Daniels (“Daniels”), Scott Davis (“Davis”), Tim Garrett (“Garrett”), and  
13 Kara LeGrand (“LeGrand”) (collectively referred to as “Defendants”) filed a non-opposition  
14 to the motion to replace Doe Defendants, (ECF No. 31), and a response to the motion for  
15 appointment of counsel, (ECF No. 32). Each motion is discussed in turn.

## I. MOTION TO REPLACE DOE DEFENDANTS

17 On June 26, 2023, the District Court screened Burdsal’s complaint, (ECF No. 8),  
18 and allowed him to proceed on: (1) First Amendment free exercise claim will proceed  
19 against Defendants Davis, Garrett, LeGrand, Daniels, and Doe Members of the Religious  
20 Review Team (“RRT”); (2) Religious Land Use and Institutionalized Person Act claim will  
21 proceed against Defendants Davis, Garrett, LeGrand, Daniels, and Doe Members of the  
22 RRT; (3) Fourteenth Amendment equal protection claim will proceed against Defendants  
23 Davis, Garrett, LeGrand, Daniels, and Doe Members of the RRT; and (4) claim for  
24 intentional infliction of emotional distress will proceed against Defendants Davis, Garrett,  
25 LeGrand, Daniels, and Doe Members of the RRT. (ECF No. 7.) Burdsal was specifically  
26 advised that if the true identity of any of the Doe Defendant(s) came to light during  
27 discovery, Burdsal could move to substitute the true names of those Does to assert claims  
28 against them at that time. (*Id.* at 6, n. 2.)

1 Burdsal has now filed a motion to replace the Doe Members of the RRT with  
2 Chaplains Donald Burse, Dana Everage, Chad Venters, Cary Dyer, March Mallinger, and  
3 Julio Calderin. (ECF No. 29.) Burdsal's motion states that he learned of the Doe's identities  
4 through discovery. (*Id.* at 2.) In response to the motion, Defendants state they do not  
5 oppose Burdsal's motion to the extent it is requesting to substitute the Doe Defendants  
6 pursuant to the screening order as the motion is timely and based on good cause. (ECF  
7 No. 31.) Pursuant to Local Rule 7-2(d), the failure of an opposing party to file points and  
8 authorities in response to any motion shall constitute a consent to the granting of the  
9 motion.

10 For good cause appearing, the Court finds that Burdsal may properly substitute the  
11 above-named defendants for the Doe Defendants as allowed in the screening order and  
12 thus the motion is granted. Additionally, pursuant to Local Rule 7-2(d), the failure of an  
13 opposing party to file points and authorities in response to any motion shall constitute a  
14 consent to the granting of the motion. Thus, the Court finds that the motion should also be  
15 granted based on Defendants' non-opposition.

16 **II. MOTION FOR APPOINTMENT OF COUNSEL**

17 Next, Burdsal filed a motion for appointment of counsel. (ECF No. 30.) Defendants  
18 filed a response stating they do not take any position as to the motion. (ECF No. 32.)

19 There is no constitutional right to appointed counsel in a § 1983 action. *E.g., Rand*  
20 *v. Rowland*, 113 F.3d 1520, 1525 (9th Cir. 1997), *opinion reinstated in pertinent part*, 154  
21 F.3d 952, 954 n.1 (9th Cir. 1998) (en banc). The provision in 28 U.S.C. §1915(e)(1) gives  
22 the court discretion to "request an attorney to represent any person unable to afford  
23 counsel." 28 U.S.C. § 1915(e)(1); *see, e.g., Wilborn v. Escalderon*, 789 F.2d 1328, 1331  
24 (9th Cir. 1998) (en banc.) While the decision to request counsel lies within the discretion  
25 of the district court, the court may exercise this discretion to request counsel only under  
26 "exceptional circumstances." *Terrell v. Brewer*, 935 F.2d 1015, 1017 (9th Cir. 1991).

27 A finding of "exceptional circumstances" requires the court to evaluate (1) the  
28 plaintiff's likelihood of success on the merits and (2) the Plaintiff's ability to articulate his

1 claims *pro se* considering the complexity of the legal issues involved. *Id.* (quoting *Wilborn*,  
 2 789 F.2d at 1331) (internal quotation marks omitted). Neither factor is dispositive, and both  
 3 factors must be considered before a court decides. *Id.* The difficulties every litigant faces  
 4 when proceeding *pro se* does not qualify as an exceptional circumstance. *Wood v.*  
 5 *Housewright*, 900 F. 2d 1332, 1335-36 (9th Cir. 1990). While almost any *pro se* litigant  
 6 would benefit from the assistance of competent counsel, such a benefit does not rise to  
 7 the level of “exceptional circumstances.” *Rand*, 113 F.3d at 1525. Rather, the plaintiff must  
 8 demonstrate that he is unable to articulate his claims due to their complexity. *Id.*

9 The motion for appointment of counsel states the substantive issues and  
 10 procedural matters are too complex for Burdsal’s comprehension and abilities, and by  
 11 reason of his incarceration, Burdsal cannot effectively investigate or litigate his claims.  
 12 (ECF No. 30.)

13 Exceptional circumstances do not exist in this instance. Burdsal only makes  
 14 conclusory assertions that this case is complex, however his claims do not involve  
 15 particularly complex issues, nor will they require expert assistance to understand.  
 16 Moreover, throughout the pendency of this action, Burdsal has demonstrated that he can  
 17 articulate his claims to the Court. While Burdsal contends that he has limited knowledge  
 18 in these types of proceedings, such lack of education and experience is unexceptional  
 19 compared to most prisoner civil rights cases. Accordingly, because Burdsal has not  
 20 demonstrated exceptional circumstances, the Court denies the motion. (ECF No. 30).

21 **III. CONCLUSION**

22 Accordingly, **IT IS HEREBY ORDERED** that Burdsal’s motion to replace Doe  
 23 Defendants, (ECF No. 29), is **GRANTED**.

24 **IT IS FURTHER ORDERED** that Defendants Donald Burse, Dana Everage, Chad  
 25 Venters, Cary Dyer, March Mallinger, and Julio Calderin shall be added to the docket as  
 26 defendants in this action.

27 **IT IS FURTHER ORDERED** that within 21 days of the date of entry of this order,  
 28 the Attorney General’s Office shall file notice advising the Court and Burdsal of whether it

1 can or cannot accept service on behalf of Defendants Donald Burse, Dana Everage, Chad  
2 Venters, Cary Dyer, March Mallinger, and Julio Calderin. If the Attorney General's Office  
3 cannot accept service on behalf of Donald Burse, Dana Everage, Chad Venters, Cary  
4 Dyer, March Mallinger, and Julio Calderin, the Office shall file, under seal, but shall not  
5 serve on Burdsal, the last known address of Donald Burse, Dana Everage, Chad Venters,  
6 Cary Dyer, March Mallinger, and Julio Calderin, if it has such information. If the last known  
7 address of Donald Burse, Dana Everage, Chad Venters, Cary Dyer, March Mallinger, and  
8 Julio Calderin is a post office box, the Attorney General's Office shall attempt to obtain  
9 and provide the last known physical address. If service cannot be accepted for Donald  
10 Burse, Dana Everage, Chad Venters, Cary Dyer, March Mallinger, and Julio Calderin,  
11 Burdsal shall file a motion requesting issuance of a summons, specifying a full name and  
12 address for Donald Burse, Dana Everage, Chad Venters, Cary Dyer, March Mallinger, and  
13 Julio Calderin.

14 **IT IS FURTHER ORDERED** that Burdsal's motion for appointment of counsel, (ECF  
15 No. 30), is **DENIED**.

16 **IT IS SO ORDERED.**

17 **DATED:** July 10, 2024

18   
19 **UNITED STATES MAGISTRATE JUDGE**

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